Supreme Court, U.S.
FILED

No. 09-1490 MAY 28 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

GEORGE LOUIS GARCIA,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

On Petition For A Writ Of Certiorari To The Florida Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This court in *In re Ruffalo*, 390 U.S. 544 (1968) held that lawyer disciplinary hearings are quasi-criminal proceedings. Some state courts, contrary to *In re Ruffalo*, hold that disciplinary hearings are civil proceedings and therefore allow an adverse inference.

Can an adverse inference of guilt be inferred from a lawyer's Fifth Amendment silence during a lawyer disciplinary hearing? States are split on the issue.

When do the consequences of a "compelling" (App. 11, 14), adverse inference together with other evidence rise to a level of severity to be afforded the protections of *Spevack v. Klein*, 385 U.S. 511 (1967) that forbids automatic punishments solely for exercising the right to remain silent?

PARTIES TO PROCEEDINGS

Petitioner George Louis Garcia was the Respondent at the evidentiary hearing and Appellant in the Florida Supreme Court. Respondent The Florida Bar was the Petitioner at the evidentiary hearing and Appellee in the Florida Supreme Court.

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OPINIONS BELOW

The opinion of the Florida Supreme Court (Appendix ("App.") 18) is reported at 31 So.3d 782 (Fla. 2010). The opinion of the Referee (App. 1) is unreported.

JURISDICTION

The Florida Supreme Court entered its Judgment on March 3, 2010. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment V – Trial and Punishment, Compensation for Taking

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

This case presents one issue. Can a Referee in a lawyer disciplinary hearing find a "compelling" (App. 11, 14), adverse inference from the invocation of the Fifth Amendment right against self-incrimination?

States are split on the issue. This court has never addressed the issue.

The related issue is when do the consequences of a "compelling" (App. 11, 14), adverse inference together with other evidence rise to a level of severity to be afforded the protections of *Spevack v. Klein*, 385 U.S. 511 (1967) that forbids automatic punishments solely for exercising the right to remain silent?

The Referee's order specifically finds a "compelling" adverse inference from the silence of Petitioner after invoking his Fifth Amendment right against self-incrimination. (App. 11, 14) The Referee found that "the Respondent exercised his right to remain silent and declined to answer any questions or offer any explanations in this matter. Although he is entitled to exercise this right, the inferences that can and should be drawn from his silence are compelling." (App. 11, 14) Petitioner was permanently disbarred. (App. 15)

Initially Petitioner was charged by The Florida Bar with "a vast conspiracy that defrauded a host of lenders and other entities by conducting countless fraudulent real estate transactions." (App. 14) Petitioner was serving a "rehabilitative suspension" (App. 16) from The Florida Bar, while employed with the approval of The Florida Bar, by supervising lawyer Mr. Gabriel Martin, Esq. (App. 4) Before the evidentiary hearing Respondent deferred these accusations of criminal activity to another case it claimed it was building against Petitioner and proceeded with more

technical violations of the Rules Regulating The Florida Bar.[1] The Referee found that Petitioner violated Rule 3-6.1 of the Rules Regulating The Florida Bar that prohibits a suspended lawyer from handling trust funds.[2] (App. 10) Although violation of Rule 3-6.1 was not specifically charged, the Referee held that since the charges made multiple mentions of fraud and trust accounts, in some fashion the handling of trust funds by a suspended lawyer in violation of Rule 3-6.1 could be inferred and sufficiently informed Petitioner of the charges against him.[3] (App. 14) Petitioner invoked his Fifth Amendment right to remain silent and the Referee specifically found that this silence gave rise to a "compelling" adverse inference. (App. 11, 14) The Florida Supreme Court approved the Referee's order and permanently disbarred Petitioner. (App. 18)

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[1] The Referee stated she would assume for purposes of the hearing that no fraud existed pursuant to stipulation. (App. 3, 14)

[2] Petitioner was also found to have committed the de minimis violation of not correcting a third party that referred to Petitioner as a lawyer. The Referee specifically found that the "de minimis" violation alone was not grounds for discipline. (App. 14)

[3] The Referee found there was "overwhelming evidence that Petitioner directed large sums of money into and out of" the trust account of the lawyer who employed Petitioner. (App. 12) Testimony established that a lawyer is not needed to conduct real estate closings. (App. 3-4, 10)

PROCEEDINGS BELOW

The Florida Bar filed a Petition for Contempt and Order to Show Cause, alleging Petitioner violated an existing order of suspension, on September 26, 2006. (App. 2) The Florida Supreme Court appointed a Referee to conduct a disciplinary hearing. An evidentiary hearing was held and the Florida Supreme Court approved the order of the Referee and denied the appeal of Petitioner. (App. 18)

REASONS FOR GRANTING THE PETITION

States are split as to whether an adverse inference can be drawn from the Fifth Amendment silence of a lawyer during a disciplinary hearing. Some states follow the teachings of this court in *In re Ruffalo*, 390 U.S. 544 (1968), and *Spevack v. Klein*, 385 U.S. 511 (1967), finding that disciplinary hearings are quasi-criminal, prohibiting an adverse inference from Fifth Amendment silence. Other state courts, contrary to *In re Ruffalo* and logic of *Spevack*, hold that disciplinary hearings are civil proceedings and therefore allow an adverse inference.

"It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd v. United States*, 116 U.S. 616, 635 (1886) (overturned on another point of law). If the courts cannot protect attorneys, officers of the court designated to advocate on behalf

of the Constitution, from this encroachment, how can we hope to protect the ordinary citizen?

An adverse inference from Fifth Amendment silence is prohibited in a criminal proceeding,[4] but is permissible in a civil proceeding.[5] The case before the court poses the question of whether an adverse inference can be drawn from silence in the "quasi-criminal" proceeding of a lawyer disciplinary hearing. *In re Ruffalo*, 390 U.S. at 551.[6] This court has never directly addressed the issue.

In the case before the court the Referee appointed by the Florida Supreme Court found "the inferences that can and should be drawn from his silence are compelling." (App. 11, 14) Petitioner was permanently disbarred. (App. 15)

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[4] *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (The Fifth Amendment protects both the innocent and the guilty in a criminal proceeding).

[5] This court held that parole hearings are civil in nature, allowing an adverse inference from Fifth Amendment silence. *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976). Baxter further distinguished cases that forbid adverse inferences, the *Garrity v. New Jersey*, 385 U.S. 493 (1967), and *Lefkowitz v. Cunningham*, 43 U.S. 801 (1977), line of cases, because they involved automatic punishments or conclusive inferences rather than an adverse inference that was combined with other evidence.

[6] *Cf. In re Echeles*, 430 F.2d 347, 349 (7th Cir. 1970) ("[D]isbarment and suspension proceedings are neither civil nor criminal in nature but are special proceedings, sui generis,. . . . They are not for the purpose of punishment, but rather . . . to protect the courts and the public from the official ministration of persons unfit to practice.").

This court has placed limits on prescribed consequences or automatic punishments for invocation of the right to remain silent in lawyer disciplinary hearings. *Spevack v. Klein*, 385 U.S. 511 (1967) holds that a lawyer cannot suffer the automatic consequence of disbarment solely as a result of asserting the privilege against self-incrimination. The plurality in *Spevack v. Klein*, 382 U.S. 511 (1967) overruled *Cohen v. Hurley*, 366 U.S. 117 (1961), which allowed for the disbarment of a lawyer solely for exercising the right to remain silent. Even the *Cohen* court noted that there are limits to "the drawing of inferences from a refusal to testify on grounds of possible self-incrimination, no matter how objectionable or irrational." *Cohen*, 366 U.S. at 129. Noting that the privilege against self-incrimination should be read expansively, the *Spevack* court stated "[i]t is in that tradition that we overrule *Cohen v. Hurley*. We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others." *Spevack*, 382 U.S. at 516.

This court had previously held that the school teacher in *Slochower v. Board of Education*, 350 U.S. 551 (1956) could not be dismissed based solely upon the assertion of his Fifth Amendment right to remain silent. Similarly, the conviction of the police officer in *Garrity v. New Jersey*, 385 U.S. 493 (1967) was reversed because the officer was compelled to waive his right to remain silent during an investigation or his employment would be terminated. Again, in *Gardner v. Broderick*, 392 U.S. 273 (1968), this court held that

a police officer could not be discharged solely for not waiving, without immunity, his right against self-incrimination during a grand jury investigation. In *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) this court held unconstitutional a New York statute that barred for 5 years any person from holding party or political office if he refused to waive his statutory immunity and right to remain silent before a grand jury.[7] This court similarly forbids automatic termination of employment, solely upon the exercise of the right to remain silent without a grant of immunity, for state employees[8] and state contractors.[9]

The case before the court differs slightly from the cases above in that there was no statute or rule that required a prescribed automatic punishment solely for the invocation of the right to remain silent. Instead the Florida Supreme Court affirmed the Referee's finding that the invocation of Petitioner's right to remain silent, despite other pending claims of criminal fraud by The Florida Bar, provided a "compelling" adverse inference against Petitioner. (App. 11, 14) This adverse inference was not the sole

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[7] This court noted regarding the lawyer in *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) his "professional standing as a practicing lawyer would suffer by his removal from his political offices." *Id.* at 807. It is worth noting that the punishment in *Lefkowitz* was a five year suspension and in the case before the court Petitioner is permanently disbarred. (App. 15)

[8] *Uniformed Sanitation Men Ass'n v. Sanitation Comm'r*, 392 U.S. 280 (1968).

[9] *Lefkowitz v. Turley*, 414 U.S. 70 (1973).

evidence against Petitioner. There was no prescribed or automatic punishment for invocation of the right to remain silent as in *Spevack*. Instead the case before the court is one very small step removed from the above teachings of this court in that the invocation of the right to remain silent created a "compelling" adverse inference in the weighing of the evidence which then led to permanent disbarment.[10] (App. 11, 14)

STATES THAT FORBID ADVERSE INFERENCES

States that forbid adverse inferences from Fifth Amendment silence in lawyer disciplinary hearings tend to follow the quasi-criminal rationale of *In re Ruffalo* and the logic of *Spevack*.

The Supreme Court of Pennsylvania in, *In re Silverberg*, 327 A.2d 106 (Pa. 1974), *later app.* 344 A.2d 804, *later app.* 437 A.2d 1169, *cert. denied* 456 U.S. 975, held that "references to appellants' exercise of their constitutional rights were allegedly designed only to impeach their credibility. We conclude that utilization, over objection, of appellant's assertion of the privilege against self-incrimination violated their rights under the Fifth Amendment to the United States Constitution and article I, section 9 of the Pennsylvania Constitution." *Id.* at 109.

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[10] There was also a "de minimis" violation of not correcting a third party assertion that Petitioner was a lawyer. The Referee found that this alone was not grounds for discipline. (App. 14)

The Supreme Court of Michigan, following the logic of *Spevack* and citing its own constitution, held that no adverse inference can be drawn from the invocation of the right to remain silent in a lawyer disciplinary hearing. *In re Woll*, 194 N.W.2d 835 (Mich. 1972).

The Court of Appeals, the highest court in Maryland, holds that "[n]o adverse inference may be drawn from the attorney's refusal to testify in a disciplinary proceeding against him." *See Attorney Grievance Comm'n v. Unnamed Attorney*, 467 A.2d 517, 521 (Md. 1983).

Similarly the Supreme Court of Oklahoma held that the lawyer "did not invoke the protections of the Fifth Amendment but relied on rule 6.11(d) of the RGDP. Rule 6.11(d) provides more extensive protection than the Fifth Amendment by protecting testimony regarding acts which although not criminal, could lead to discipline as well as testimony which could lead to criminal prosecution." *State ex rel. Oklahoma Bar Ass'n v. Wilcox*, 942 P.2d 205, 208 (Okla. 1997).

As to the issue of silence for the failure to present evidence of good character as mitigating evidence, the Louisiana Supreme Court held that "[w]hile good character may be proved as a mitigating factor, there is no negative inference if a respondent fails to produce such evidence." *In re Regan*, 885 So.2d 514, 516 n. 3 (La. 2004).

The state of Illinois provides a process for the immunization from subsequent prosecution and thus the issue of adverse inference from silence can be avoided. *In re March*, 376 N.E.2d 213 (Ill. 1978) "We accordingly hold that an attorney in a disciplinary proceeding may be compelled to testify if he is granted immunity by this court from the use of such testimony at subsequent criminal proceedings and is so informed at the disciplinary hearing. Thereafter, a continued refusal to testify may, obviously, result in disciplinary sanctions." *Id.* at 221.[11]

Some states define the purpose of attorney discipline as "disassociated with the concept of punishment for wrongdoing[.]" *State Bar of Michigan v. Block*, 158 N.W.2d 49, 54 (Mich. Ct. App. 1968). For again, "[t]he purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public the legal system, and the legal profession." *Akinaka v. Disciplinary Bd. of Hawai'i Supreme Court*, 979 P.2d 1077, 1084 (Haw. 1999) *citing* ABA Standards for Imposing Lawyer Sanctions Std. 1.1, *reprinted in*

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[11] Government employees automatically receive immunity from prosecution. Thus the only issue is whether they need to be informed of this right to immunity before being questioned, so as not to have their employment terminated for a failure to answer questions. *E.g.* Lindsay Niehaus, *The Fifth Amendment Disclosure Obligations of Government Employers When Interrogating Public Employees*, 21 Regent U. L. Rev. 59 (2009).

Selected Statutes Rules and Standards on the Legal Profession 347, 358 (1990). This logic is instructive.

In the case before the court, Petitioner was already serving a "rehabilitative suspension" and thus was not a threat to the public. (App. 16) Now disbarred, Petitioner can do real estate closings, handle escrow accounts and is not subject to regulation, supervision or discipline by The Florida Bar. Thus we can infer that the main purpose of the "compelling" adverse inference and consequences to Petitioner in the case before the court was punishment. (App. 11, 14)

STATES ALLOWING ADVERSE INFERENCES[12]

Some states refer to lawyer disciplinary hearings as civil proceedings,[13] failing to recognize the

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[12] One state studiously avoided the issue. *E.g. People v. Robnett*, 859 P.2d 872, 875 (Colo. 1993) ("We need not resolve the question of whether the fact finder in an attorney disciplinary proceeding may draw a negative inference from an attorney-respondent's invocation of the Fifth Amendment privilege against self-incrimination, however, because there is no indication that the hearing board below drew any such inference.").

[13] *Cf.* The S.E.C. enforcement manual states that "[d]uring litigation, the SEC can assert that an adverse inference should be drawn against an individual who has asserted the Fifth Amendment privilege." Securities and Exchange Commission Division of Enforcement, Enforcement Manual § 4.1.3 at 97 (Oct. 6, 2008), available at: www.sec.gov/divisions/enforce/enforcement manual.pdf. Because the S.E.C. is charged with enforcing civil securities laws that also contain criminal sanctions, Securities

(Continued on following page)

"quasi-criminal" status articulated in *In re Ruffalo*, 390 U.S. 544 (1968).

The Wisconsin Supreme Court in *State v. Postorino*, 193 N.W.2d 1 (Wisc. 1972) held that "[t]aking the Fifth Amendment does not foreclose a court in a civil action from drawing an inference from the invocation of the Fifth Amendment on an issue involving grounds for discipline. A disciplinary proceeding, such as this, is a civil proceeding and so designated by sec. 256.28(12), Stats., and this court has often said a disciplinary proceeding was a civil proceeding and not a criminal one." *Id.* at 3.

Similarly the Maine Supreme Court held that "(d)isciplinary proceedings are civil in nature, and a lawyer has no constitutional right to prevent the fact finder in that proceeding from considering the implications of his silence, along with other evidence against him, in making a determination." *State v. Horton*, 561 A.2d 488, 491 (Me. 1989).

Following the rationale of a civil proceeding, the Georgia Supreme Court held that in a disciplinary

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Act of 1933 and Securities Exchange Act of 1934, a S.E.C. target is likely to invoke his Fifth Amendment right to remain silent.

In white collar investigations the Department of Justice can use deferred prosecutions against corporations to encourage management to terminate employees who refuse to waive their Fifth Amendment rights. *E.g.* Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. Rev. 311 (2007).

hearing the finder of fact could "take into consideration the refusal of Meier to testify in his own behalf." *Matter of Meier*, 344 S.E.2d 212, 213 (Ga. 1986), *citing Simpson v. Simpson*, 209 S.E.2d 611 (Ga. 1974); *Hathcock v. Hathcock*, 287 S.E.2d 19 (Ga. 1982).

New York allows for an adverse inference. "In the context of disciplinary proceedings, this Court has previously drawn an adverse inference against attorneys such as respondent who have invoked their Fifth Amendment privilege against self-incrimination." *In re Snyder*, 71 A.D.3d 140 (N.Y. App. Div. 1 2010).

Thus the issue in the case before the court rests upon two considerations. First, do the consequences of a "compelling" adverse inference (App. 11, 14), in the weighing of other evidence that results in permanent disbarment, rise to the severity of an automatic punishment based solely upon Fifth Amendment silence that is prohibited in *Spevack*? Secondly, are lawyer disciplinary hearings still quasi-criminal as articulated in *In re Ruffalo* or have lawyer disciplinary hearings eroded into a civil proceeding requiring a lesser degree of due process?

If the courts cannot protect attorneys, officers of the court designated to advocate on behalf of the Constitution, from encroachment on constitutional rights, how can we hope to protect the ordinary citizen?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 2010

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,
v.
GEORGE LOUIS GARCIA,
Respondent.
_____/

Supreme Court Case No. SC06-1881

The Florida Bar File No. 2006-71,187 (11M-OSC)

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS: Pursuant to the undersigned being duly appointed as Referee for the Supreme Court of Florida to conduct disciplinary proceedings as provided for by Rule 3-5.2(g) of the Rules Regulating The Florida Bar, a final hearing of this cause was undertaken. All of the pleadings, notices, motions, orders, and exhibits are forwarded with this report and the foregoing constitute the record in this case.

The following attorneys appeared as counsel for the parties:

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II. PROCEDURAL HISTORY:

1. Pursuant to Supreme Court order, dated May 25, 2000, case number 94,963, Respondent received a three year suspension effective, nunc pro tunc, to August 8, 1998. The Respondent has never been reinstated to practice before the Bar.

2. On or about September 26, 2006, The Florida Bar filed its Petition for Contempt and Order to Show Cause alleging that Respondent violated the May 25, 2000 suspension order.

3. The Petition for Contempt and Order to Show Cause contained very sweeping allegations of misconduct. However, the essence of the petition contained three types or categories of alleged violations:

a.) The first category of alleged violations related to the Respondent engaging in the unlicensed practice of law in connection with his work as a real estate paralegal.

b.) The second category of alleged violations related to the Respondent affirmatively representing himself to the public as a practicing lawyer.

c.) The third and most serious allegations concerned the Respondent's fraudulent use of his employer's trust account for personal gain.

4. At an appropriate point in the pre-trial phase of this litigation, Respondent's counsel filed a motion seeking a more particularized statement from the Bar as to the allegations of fraud and the matter was set for hearing. However, prior to the start of this hearing, Bar counsel advised the Court, as he had previously advised counsel for Respondent, that the allegations of fraud were the subject of a new, separate disciplinary complaint which at that time was winding its way through the normal process of disciplinary investigation by the Bar. (That matter is now pending before the undersigned in Supreme Court case number SC 07-2363; The Florida Bar File number 2008-70,228 (11M).) It was clearly understood that *none* of the allegations of fraud would remain as part of this case. In fact the undersigned assumed, for purpose of this case, that *all* of the approximately 90 real estate closings the Respondent conducted were appropriately handled without complaint from any lender, seller or purchaser.

5. Although it was not formally announced, it was clear that the Bar did not pursue allegations relating to Respondent engaging in the practice of law during the period of his suspension. At least tacitly, the Bar acknowledged that it is permissible for a non-lawyer, including a suspended lawyer (an important distinction in this case) to perform most of the tasks that are normally associated with real

estate closings, including preparation of HUD-1 forms and dealing directly with the lenders to obtain information about a property. In fact, the Bar specifically approved exactly this type of employment by the Respondent on several occasions. (Respondent's Composite Exhibit E) Therefore, despite both the severity and the scope of the initial allegations, this case was tried, and ultimately decided, on two relatively narrow points.

III. ISSUES PRESENTED:

Did the Respondent violate the Supreme Court order of May 25, 2000 by affirmatively holding himself out to the public as a practicing attorney?

Did the Respondent violate the Supreme Court order of May 25, 2000 by receiving, disbursing, or otherwise handling trust funds in violation of Rule 3-6.1(e)?

IV. FINDINGS OF FACT:

1. Since 1998 the Respondent has worked for numerous attorneys as a real estate paralegal with the Bar's knowledge and consent. In January of 2005 the Respondent was employed by Mr. Gabriel Martin ("Martin") in this capacity. Martin testified that when he met the Respondent he was in the process of running for election as a candidate for Public Defender in Miami-Dade County and trying to establish a private practice. (Martin was previously employed as an

Assistant Public Defender by the incumbent Public Defender.) Initially, the meetings between the Respondent and Martin were informal and exploratory as Martin was focusing his efforts on trying to win the election. However, once Martin was defeated, he and the Respondent met again and ultimately agreed to enter into what, at least on paper, was an employment relationship.

2. Martin had very little experience in private practice. His area of specialization was criminal defense and he knew nothing about real estate law. Unfortunately, he also knew next to nothing about trust accounting requirements. Martin testified that once he left the Public Defender's office and before he associated with the Respondent, he opened a law office operating account and a trust account at a local bank and apparently with the help of the bank officer he correctly opened an IOTA trust account. Martin came to think of these two accounts as his "non-real estate" accounts. Once he "hired" the Respondent he decided to open separate operating and trust accounts that he referred to as the "real estate" accounts. Martin testified that these two "real estate" accounts were opened at Ocean Bank, not at his original bank, at the suggestion of the Respondent. This was because of the Respondent's longstanding relationship with Ocean Bank. Martin testified that the Respondent accompanied him to the bank, made introductions to the bank officer and was present while the documents for the two accounts were prepared.

3. Although Martin was technically the Respondent's employer, it was very clear that the Respondent was the economic engine behind Martin's real estate practice. The Respondent advised Martin to take courses so he could become authorized to write title insurance and earn a fee as the issuing agent. In fact the evidence showed that with the exception of writing the title policy, a job that can only be done by an attorney, every other task, on every closing was actually done by the Respondent. The Respondent brought in the business, he prepared all the documents and he conducted the closings. In over 90 residential closings, Martin was only physically present at one closing. Martin testified that it was initially his intention to learn how to develop and manage a real estate practice with the Respondent's help. However, in reality Martin concentrated on criminal defense and other practice areas and the Respondent handled the real estate side of the practice in at least a semi-autonomous manner. This arrangement would probably have been acceptable assuming Martin exercised appropriate supervision ***and*** that the Respondent did not affirmatively represent himself to be a practicing attorney ***and*** that the Respondent never received, disbursed, or otherwise handled trust funds.

4. On occasion other attorneys or their employees corresponded with the Respondent about pending closings. In some instances the Respondent was addressed as "Esquire" or "Esq." by the attorney or his or her staff. However there was no evidence that the Respondent had done anything to encourage anyone

to think he was a practicing attorney. In fact, the Respondent's correspondence to lawyers and their employees did not include any reference by him to his status as either a paralegal or attorney. Rather, the Respondent simply used his name without any designation. The Bar's allegation that he held himself out as a practicing attorney in this context is NOT SUSTAINED.

5. The Bar also contended that the Respondent held himself out as an attorney in good standing to representatives of Ocean Bank. The Bar produced no actual witnesses on this point and instead relied on certain bank documents to support its contention. (Florida Bar Exhibit 4) The evidence showed that in 2006 the Respondent opened a new account at Ocean Bank in the name of "Geobunny Investments, Inc." This was an account the Respondent apparently intended to use for his personal real estate investments. One of the documents completed by bank employee Olympia Guzman was entitled "Know Your Customer." This form is what is commonly known as a due diligence or anti-money laundering form and is used by many financial institutions. The form was completed by Ms. Guzman and in the form she indicated that the Respondent was an "attorney at law." She also added the following language at the bottom of the form:

> "Mr. Garcia is an attorney specialized in Real Estate closings. He does work for Gabriel Martin, P.A. Also our customer. Mr. and Mrs.

> Garcia also have their personal account with us." [Sic.]

The Bar's position was that it should be assumed that the Respondent gave this information to Ms. Guzman in 2006 and that is why she included it the "Know Your Customer Form." Although the Respondent never testified in this matter, his counsel presented evidence that the Respondent had a longstanding relationship with Ocean Bank and with Ms. Guzman dating back to the early 1990's. During that time he was a practicing attorney in good standing in the state of Florida. It is possible, even likely, that Ms. Guzman made assumptions about the Respondents status with The Florida Bar based on this prior relationship. In the absence of any evidence that the Respondent ever saw this form or that he actually told Ms. Guzman any of this information at or near the time the form was generated in 2006 these allegations are also NOT SUSTAINED.

6. The third and only proven example of the Respondent representing himself as an attorney concerned his telephone conversation with representatives of a company called Transcontinental Lending. Apparently at least one of the mortgages processed at Martin's office by the Respondent was eventually sold to investors by Transcontinental Lending. After the investors had an opportunity to look over the various loan documents associated with the mortgage, they exercised their right to have Transcontinental "buy back" the loan. Transcontinental bought the loan back from the investors and eventually a Transcontinental

representative contacted the Respondent. The purpose of this call was to correct whatever deficiencies the investors saw in the loan documents so that the loan could be successfully re-sold to another investor. During this initial contact, the Respondent advised the Transcontinental representative that the loan in question was in the process of being refinanced and paid. Clearly, this was completely satisfactory to Transcontinental and their representative testified that he placed his loan file in pending status in anticipation of the forthcoming closing. In the interim, an investigator from the Bar became aware of serious allegations concerning these closings and made contact with representatives of Transcontinental. Eventually, the two Transcontinental owners, the employee who first contacted the Respondent, and the Bar investigator all went into a conference room and made an unscheduled call to the Respondent. The call was ostensibly to follow-up on the closing for the problem loan. In reality, the investigator was interested in gathering information that could be useful in the Bar's ongoing investigation. Each of the witnesses had a slightly different version of exactly what was said and how the meeting unfolded. For example, one witness recalled that he heard the entire conversation on a speaker phone. Another testified that Transcontinental's representative was speaking on a regular phone and one believed that the conversation started on the speaker phone and then the phone was picked up and taken off speaker. The undersigned found the testimony of the investigator for the Bar to be the most accurate and credible and finds that during this

conversation the Respondent was asked by Transcontinental's representative, "You're their attorney, aren't you?" and the Respondent answered "Yes." The allegation that the Respondent held himself out as an attorney on this one occasion is SUSTAINED.

7. The heart of the Bar's case was clearly *not* this one conversation with Transcontinental. The real issue was whether the Respondent, while still under a suspension order, "received, disbursed, or otherwise handled trust funds" in violation of Rule 3-6.1. In answering that question in the affirmative the following factors were of particular importance:

- A non-attorney is able to receive, disburse and otherwise handle trust funds. In fact, it is a common practice for non-attorney closing agents to engage in these functions at real estate closings. However, this Respondent is not a "non-attorney" his status is that of a "suspended attorney."
- As a suspended attorney, pursuant to Rule 3-6.1, the Respondent was under an absolute obligation not to receive, disburse, or otherwise handle trust funds or property. This Respondent was fully aware of this prohibition and had repeatedly acknowledged his compliance with this prohibition under oath in writing. (Florida Bar Exhibit 2)
- The Respondent exercised his right to remain silent and declined to answer any questions or offer any explanations

> in this matter. Although he is entitled to exercise this right, the inferences that can and should be drawn from his silence are compelling.

8. Martin believed he opened an operating account and a trust account at Ocean Bank on the same day. In fact he opened the accounts on different days and as far as Ocean Bank was concerned both were "non personal" checking accounts, not trust accounts. The first of those accounts was opened on 2-25-05 and ends in the numbers "205." The account title on the opening paperwork for this account is "Gabriel Martin, P.A." The second account was opened on 4-4-05, is also titled in the name of "Gabriel Martin, P.A." and it ends in the numbers "305." (Respondent's Composite Exhibit C) Martin believed that the "305" account was his real estate operating account and he had checks printed with the name of his law firm and the designation "Operating Account" on the face of each of the "305" checks. Martin also believed that the "205" account was his real estate trust account and he also had checks printed with his firm name and the designation "Trust Account" on the face of each of the "205" checks. Martin testified that he would occasionally pre-sign "305/Operating Account" checks in blank for the Respondent to fill in at closings. Martin also testified that he never pre-signed his "205/Trust Account" checks. Although the "205/Trust Account" was never in compliance with the IOTA or other record keeping requirements of the Bar, Martin treated it as his real estate trust account. He distinguished it from his "305/Operating Account"

by allowing the Respondent to fill in blank checks on one account but not the other. He and the Respondent also commonly referred to the accounts as the "Operating" and "Trust" accounts, and obviously the face of each of the checks contained the designation. The "205/Trust Account" was clearly used as a real estate trust account by both Martin and the Respondent in over 90 real estate closings.

9. There was overwhelming evidence that the Respondent directed large sums of money into and out of the "205/Trust Account." Some of that money went into the "305/Operating Account" and then back into the "205/Trust Account." Furthermore, both "305/Operating" and "205/Trust Account" funds went into and out of the Respondent's Geobunny Investments, Inc. account that was also maintained at Ocean Bank. (Florida Bar Exhibit 9) Respondent received, handled, and directed trust account funds independently of any effective control by Martin.

10. Respondent actually knew, and at a minimum should have known, that as a suspended attorney, as opposed to a non-lawyer, he had an affirmative obligation to have nothing to do with *any* trust account funds. Although the Respondent chose not to testify there were two arguments advanced on his behalf by his very able counsel. The first was essentially that Rule 3-6.1 should be read and applied narrowly. It was asserted that because the "205/Trust Account" was not actually a properly opened IOTA account, and because Rule 3-6.1 only applies to IOTA trust accounts, the Respondent could not be guilty of

violating the Rule 3-6.1. The argument advanced on behalf of the Respondent was that since the "205/ Trust Account" was really some type of escrow or settlement account, one that could have been administered by a non-lawyer, it was not a trust account as contemplated by Rule 3-6.1. While I accept the factual premise of counsel's argument, a non-lawyer could have received, directed and controlled these funds, I cannot agree that it is appropriate to narrowly read Rule 3-6.1. The explicit language of the Rule suggests that the prohibitions imposed on suspended lawyers should be given an expansive reading. Nothing limits the Rule 3-6.1 prohibitions to IOTA accounts or even to attorney's accounts. Not only must the suspended attorney not receive or disburse any trust funds, included within the plain language of the Rule is the additional requirement not to "otherwise handle trust funds or property." As a suspended attorney the Respondent was subject to at least the plain language, if not the spirit, of Rule 3-6.1. He should have avoided all contact with any type of trust funds and he repeatedly and willfully failed to do so.

11. The second argument advanced by counsel for the Respondent was a procedural/due process argument. Counsel contended that because a Rule 3-6.1 violation was not specifically mentioned in the Petition for Contempt, the Respondent could not be found in contempt for violating this specific provision. Simply stated, the Respondent's contention was that the Bar should not be permitted to plead one thing (fraud) and prove another (violation of Rule 3-6.1).

However true this may be as a general proposition, it is not applicable in this case. The Respondent was originally accused of using the "205/Trust Account" to engage in a "vast conspiracy that defrauded a host of lenders and other entities by conducting countless fraudulent real estate transactions." The allegations in the Petition for Contempt always specified that the Respondent's use of the "205/Trust Account" during his employment with Martin was at issue. In a pre-trial stipulation, all allegations of fraud were eliminated from consideration in this case and it was understood that the Referee would presume that there was no fraud of any kind in these transactions. However, the issue that remained was always understood to be whether given his status as a suspended lawyer, the Respondent's improperly used the "205/Trust Account." There was ample affirmative evidence to support this conclusion. In addition, because Respondent chose not to testify and explain the transactions or contradict the testimony of Martin, the additional negative inferences are compelling. The Bar met its burden of proving the Respondent violated the order of suspension in two respects. The Respondent held himself out as an attorney in his telephone conversation with the Transcontinental representatives. However, under the totality of circumstances this was a de minims violation and standing alone it would not have supported a recommendation that the Respondent be found in contempt. However, the Respondent's flagrant and willful violations of Rule 3-6.1 in connection with the Martin "205/Trust Account" are extremely serious and support a

recommendation of a finding of contempt of the Supreme Court order of May 25, 2000.

V. RECOMMENDATION AS TO GUILT:

I recommend that Respondent be found in contempt of the Supreme Court order dated May 25, 2000, in case number 94,963.

VI. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED:

Based on the foregoing findings of fact, I hereby find that PERMANENT DISBARMENT is the appropriate sanction in this case. In making this recommendation the Referee heard and considered the Respondent's mitigation evidence.

VII. STATEMENT OF COSTS AND RECOMMENDATION AS TO THE MANNER IN WHICH COSTS SHOULD BE TAXED:

The Referee reserves on the taxation of costs in this matter. For reasons previously alluded to in prior requests for extensions, this matter was tried in the last days of the time period permitted by the court. The first draft of this Report did include the Bar's itemized statement of costs but that document was not provided to Respondent's counsel until late in the day on February 27, 2008. Counsel for the Respondent has filed his objections to the Bar's request and the Bar would like the opportunity to reply. Both

counsel have conferred and have agreed that the Report of the Referee should be finalized with this issue reserved. A Supplemental Report will be filed within ten (10) days.

VIII. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD:

Age: 53

Date Admitted to Bar: July 2, 1993

Prior disciplinary record:

1. In The Florida Bar File No. 1999-70,037 (11P), Supreme Court Case No. SC93-913, Respondent was suspended pursuant to court order dated January 4, 1999, as a result of his entering a plea of no contest to two felony counts. (Adjudication was withheld as to both counts.)

2. In The Florida Bar File No. 1999-70,869 (11M), Supreme Court Case No. SC94-963, Respondent received a rehabilitative suspension pursuant to court order dated May 25, 2000, due to the above referenced felony pleas.

DATED this 29 day of Feb., 2008.

/s/ Deborah White-Labora
HON. DEBORAH WHITE-LABORA,
Referee

Copies furnished to:
Michael Zelman, Attorney for the Respondent
Kenneth L. Marvin, Staff Counsel
William Mulligan, Bar Counsel

Supreme Court of Florida

FRIDAY, JANUARY 8, 2010

CASE NO.: SC06-1881
Lower Tribunal No(s).: 2006-71,187(11M-OSC)

THE FLORIDA BAR vs. GEORGE LOUIS GARCIA

Complainant(s) Respondent(s)

The report of the referee, and supplement thereto, is approved. Respondent is held in contempt of this Court and permanently disbarred, effective immediately.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from George Louis Garcia in the amount of $7,554.34, for which sum let execution issue.

Not final until time expires to file motion for rehearing, and if filed, determined. *The filing of a motion for rehearing shall not alter the effective date of this permanent disbarment.*

QUINCE, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, LABARGA, and PERRY, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall [SEAL]
Thomas D. Hall
Clerk, Supreme Court

cic

Served:

HON. DEBORAH WHITE-LABORA, JUDGE
KENNETH LAWRENCE MARVIN
WILLIAM MULLIGAN
GEORGE LOUIS GARCIA

Supreme Court of Florida

WEDNESDAY, MARCH 3, 2010

CASE NO.: SC06-1881
Lower Tribunal No(s).: 2006-71,187(11M-OSC)

THE FLORIDA BAR vs. GEORGE LOUIS GARCIA

Complainant(s) Respondent(s)

Respondent's "Motion for Rehearing and Certification" is hereby denied. *See* Fla. R. App. P. 9.330.

QUINCE, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, LABARGA, and PERRY, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall [SEAL]
Thomas D. Hall
Clerk, Supreme Court

bhp

Served:

HON. DEBORAH WHITE-LABORA, JUDGE
KENNETH LAWRENCE MARVIN
WILLIAM MULLIGAN
GEORGE LOUIS GARCIA

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(2)

Supreme Court, U.S.
FILED
OCT 3 - 2010
OFFICE OF THE CLERK

No. 09-1490

IN THE

Supreme Court of the United States

GEORGE LOUIS GARCIA,

Petitioner,

v.

THE FLORIDA BAR

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

Whether this Court's precedent prohibits adverse inferences from being drawn based upon a lawyer's Fifth Amendment silence during lawyer disciplinary hearings.

Whether any finding of a Fifth Amendment violation would be harmless error given the circumstances of the case at bar.

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STATEMENT OF THE CASE

By order dated May 25, 2000, the Florida Supreme Court suspended George Louis Garcia (the "Petitioner") from the practice of law for three years, nunc pro tunc, to August 8, 1998. (App. 2a). His license to practice law in Florida has never been reinstated. (App. 2a). Since 1998, the Petitioner has worked for numerous attorneys as a real estate paralegal with the knowledge and consent of Respondent, The Florida Bar (the "Bar"). (App. 4a). In 2005, the Petitioner began working as a real estate paralegal for Mr. Gabriel Martin, a Florida lawyer. (App. 4a). On September 26, 2006, the Bar filed a Petition for Contempt and Order to Show Cause alleging that the Petitioner violated the May 25, 2000 suspension order. (App. 2a). Bar disciplinary proceedings against the Petitioner ensued, and the case was tried on two issues: (1) whether the Petitioner violated the suspension order by holding himself out to the public as a practicing attorney; and (2) whether the Petitioner violated the suspension order by receiving, disbursing, or otherwise handling trust funds in violation of Rule 3-6.1, Rules Regulating The Florida Bar, prohibiting suspended lawyers from engaging in such conduct. (App. 4a).[1]

---

1. Although the Petitioner states in his petition that there were "pending claims of criminal fraud by The Florida Bar," there has never been a criminal proceeding involving this matter. Allegations of fraud with regard to the trust funds were the subject of a separate Bar disciplinary case against the Petitioner. (App. 3a). This separate proceeding was dismissed following entry of the Florida Supreme Court's order of permanent disbarment in the case at issue here. *See The Florida Bar v. Garcia,* Florida Supreme Court Case No. SC07-2363 at http://jweb.flcourts.org/pls/docket/ds_docket_search%20.

Petitioner exercised his Fifth Amendment right to remain silent and declined to answer any questions or offer any explanations in the disciplinary proceeding. (App. 10a-11a). Instead, the Petitioner's arguments were "advanced on his behalf by his very able counsel." (App. 12a). Nonetheless, the Referee[2] of the proceeding found that the Bar met its burden of proving that Respondent violated the suspension order by holding himself out as an attorney. (App. 14a). On this issue, the Bar called witnesses to a telephone conversation between the Petitioner and representatives of a lending company. (App. 8a-10a). The testimony reflected that the Petitioner held himself out as an attorney in the telephone conversation. (App. 10a). The Referee also found that "[t]here was overwhelming evidence that [the Petitioner] directed large sums of money into and out of" Mr. Martin's trust account. (App. 12a). The Referee found that the evidence presented by the Bar showed that the Petitioner received, handled, and directed trust account funds independently of any effective control by Mr. Martin. (App. 12a). The Referee stated that "[t]here was ample affirmative evidence to support this conclusion" and that the Bar met its burden of proof on this issue. (App. 14a). The Referee also stated that because the Petitioner "chose not to testify and explain the transactions or contradict the testimony . . . the additional negative inferences are compelling." (App. 14a).[3]

---

2. A referee is a judge or retired judge that is appointed by the Florida Supreme Court to conduct lawyer disciplinary proceedings. R. Regulating Fla. Bar 3-2.1(*l*).

3. The Florida Supreme Court adopted the order of the Referee and permanently disbarred the Petitioner. (App. 17a).

The Petitioner has now petitioned this Court for a writ of certiorari based upon the statement of the Referee that she drew adverse inferences from the Petitioner's silence during the lawyer disciplinary proceeding.

REASONS FOR DENYING THE PETITION

I. THIS COURT'S PRECEDENT DOES NOT PROHIBIT THE DRAWING OF ADVERSE INFERENCES FROM FIFTH AMENDMENT SILENCE IN LAWYER DISCIPLINARY PROCEEDINGS

It is the law of this Court that it is constitutional error under the Fifth Amendment to instruct a jury in a criminal case that it may draw an inference from a defendant's failure to testify about facts within the accused's knowledge. *E.g.*, *Griffin v. California*, 380 U.S. 609 (1965). However, there is no precedent set forth by this Court that prohibits adverse inferences being drawn from a lawyer's Fifth Amendment silence in lawyer disciplinary proceedings. Contrary to the assertions made by the Petitioner, the decisions of this Court in *In re Ruffalo*, 390 U.S. 544 (1968) and *Spevack v. Klein*, 385 U.S. 511 (1967) do not stand for the proposition that the Fifth Amendment, or other constitutional rights, are to be applied with full force in a lawyer disciplinary proceeding as in a criminal trial. Moreover, this Court's holding *Baxter v. Palmigiano*, 425 U.S. 308 (1976), indicates that the drawing of adverse inferences in disciplinary hearings is entirely appropriate if the Fifth Amendment silence does not, by itself, result in an automatic sanction.

A. Attorney Disciplinary Hearings Are Not The Equivalent of Criminal Trials So As To Incorporate All Constitutional Safeguards Afforded Criminal Defendants

The Petitioner argues that this Court's decisions in *Ruffalo*, 390 U.S. 544 (1968) and *Spevack*, 385 U.S. 511 (1967) require a finding that attorney disciplinary proceedings require the incorporation of all constitutional safeguards afforded criminal defendants in criminal trials. However, these decisions do not warrant such a finding.

In *Ruffalo*, this Court reviewed a matter where an attorney in state disbarment proceedings had no notice that his employment of a certain person would be considered a disbarment offense until after both he and that person had testified at length on all material facts pertaining to that phase of the case. 390 U.S. at 546. The Court recognized that disbarment proceedings implicate possible punishment, and found that the absence of fair notice as to the reach of the grievance proceeding, and of the precise nature of the charges, deprived the attorney of procedural due process. *Id.* at 551.

While the Court denominated disciplinary proceedings as adversarial and of a "quasi-criminal nature," the Court also observed that "[s]uch procedural violation of due process would never pass muster in any normal civil or criminal litigation." *Id.* The Court also cited to Rule 15(a) of the Federal Rules of Civil Procedure that imposes limitations on a party's ability to amend pleadings in a civil proceeding. *Id.* at 551 n.3.

As such, the Court determined that certain procedural due process safeguards are required in civil and criminal proceedings, including state bar disciplinary proceedings. However, such determination by the Court cannot be construed as transforming bar disciplinary proceedings into criminal matters. The Court made no finding whatsoever that a disciplinary proceeding is the equivalent of a criminal trial so as to mandate the incorporation of all procedural due process safeguards and constitutional protections afforded criminal defendants.[4]

In *Spevack*, the Court reviewed a matter where an attorney refused to produce financial records demanded by a subpoena duces tecum and refused to testify in his disciplinary proceeding on the basis that the production of documents and testimony would tend to incriminate him. 385 U.S. 512-13. The lower court had ordered the attorney disbarred, holding that the Fifth Amendment privilege against self-incrimination was not available to him in attorney disciplinary proceedings. *Id.* at 513. On

4. Other courts examining the question of whether the decision in *Ruffalo* requires the application in attorney disciplinary proceedings of the full panoply of rights afforded to a defendant in a criminal case have generally found that it does not. *See, e.g., Razatos v. Colorado Supreme Court*, 746 F.2d 1429, 1435-36 (10th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985); *In re Daley*, 549 F.2d 469, 475-77 (7th Cir. 1977), *cert. denied*, 434 U.S. 829 (1977); *Mississippi State Bar v. Attorney-Respondent in Disciplinary Proceedings*, 367 So. 2d 179, 183-85 (Miss. 1979); *Gerzof v. Gulotta*, 386 N.Y.S.2d 790, 796 (N.Y. Sup. 1976). As stated by the Seventh Circuit Court of Appeals regarding *Ruffalo*: "Justice Douglas' denomination of disciplinary proceedings as quasi-criminal is manifestly not crucial to [the] holding." *Daley*, 549 F.2d at 476.

review, this Court found that the disbarment could not be affirmed on the ground that the privilege was not applicable to the attorney. *Id.* at 518. The Court found that Fifth Amendment protection against self-incrimination extended to lawyers, and that it "should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it." *Id.* at 514. Thus, it is clear from the Court's holding in *Spevack* that an attorney may not be disbarred simply for asserting the Fifth Amendment privilege.[5]

Here, the Petitioner was not disbarred simply because of his invocation of his Fifth Amendment rights. The record in this matter is replete with the "overwhelming" evidence of the Petitioner's "flagrant and willful" violations of the Rules Regulating The Florida Bar in connection with a client trust account. (App. 12a; App. 14a). Notwithstanding the Petitioner's Fifth Amendment silence, the Bar met its evidentiary burden of proving that the Petitioner violated the Florida Supreme Court's order of suspension. The Referee stated that there was "ample affirmative evidence to support this conclusion." (App. 14a). Therefore, the holding in *Spevack* is not controlling

5. This holding is consistent with other opinions of this Court whereby the Court has held that the invocation of the Fifth Amendment cannot, by itself, result in the forfeiture of a public job, office, or contract. *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280 (1968); *Garrity v. State of New Jersey*, 385 U.S. 493 (1967); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956).

here. Furthermore, although the Court in *Spevack* recognized that due process demands that attorney disciplinary proceedings be conducted with certain constitutional procedural protections, the Court did not equate a disciplinary proceeding with a criminal proceeding.

It is widely recognized that the modern attorney disciplinary proceeding is neither strictly civil nor strictly criminal in nature. *See Attorney Disciplinary Proceedings: Civil or Criminal in Nature?*, 19 J. Legal Prof. 257, 262 (1994) (citing *Developments in the Law-Lawyers' Challenges and Lawyers' Responses*, 107 Harv. L. Rev. 1547, 1597-98 (1994)). In fact, neither rules of civil procedure nor criminal procedure are necessarily invoked in disciplinary proceedings, but individual judicial districts are free to define the rules to be followed. *See Standing Comm. on Discipline v. Ross*, 735 F.2d 1168, 1170 (9th Cir. 1984), *cert. denied*, 469 U.S. 1081 (1984). As stated by the Seventh Circuit Court of Appeals in *In re Echles*:

> [D]isbarment and suspension proceedings are neither civil nor criminal in nature but are special proceedings, sui generis, and result from the inherent power of courts over their officers. Such proceedings are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent. They are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministration of persons unfit to practice.

430 F.2d 347, 349 (7th Cir. 1970). *See, e.g., Canatella v. California*, 404 F.3d 1106, 1110 (9th Cir. 2005) (attorney disciplinary proceedings are "neither civil nor criminal, but an investigation into the conduct of the lawyer-respondent . . . .[t]he question before the court is whether an attorney may continue to practice a profession imbued with the public interest and trust . . . . [t]he court must consider both the fitness of one of its officers and the need to protect the public from an unqualified or unscrupulous practitioner"); *Mattice v. Meyer*, 353 F.2d 316, 319 (8th Cir. 1965) (the petition in a disbarment action does not initiate an action either civil or criminal but "invokes the inherent power of the courts to maintain the integrity of the bar and to see that . . . its members do not fall into disrepute with the general public through unprofessional or fraudulent conduct"); *The Florida Bar v. Shankman*, 41 So. 3d 166, 169 (Fla. 2010) ("[b]ar disciplinary proceedings are not civil or criminal in nature, but quasi-judicial"); *Kapelus v. State Bar of California*, 745 P.2d 917, 931 (Cal. 1987) (the modern view is that disciplinary proceedings are neither civil nor criminal in character and the objective of such proceedings "is not to impose punishment upon members of the profession but to ensure that the public, the courts, and the profession are protected against unsuitable legal practitioners"); *State v. Scott*, 639 P.2d 1131, 1134 (Kan. 1982) (attorney disciplinary proceedings are a "species unto themselves . . . [a]lthough the errant attorney may receive punishment, the purpose of these proceedings is primarily for protection of the courts, the legal profession, and the general public from those who have been lacking in professional responsibility").

It is also generally held that even when attorney disciplinary proceedings are referred to as "quasi-criminal," ordinary criminal procedural safeguards do not apply in such proceedings. *E.g.*, *Razatos v. Colorado Supreme Court*, 746 F.2d 1429 (10th Cir. 1984) (where nine-member panel made the final determination of facts in attorney disciplinary proceedings and only those three members who were on the hearing committee actually observed the witnesses or had a transcript of the committee hearing, there was no violation of due process), *cert. denied*, 471 U.S. 1016 (1985); *Mississippi Comm'n on Judicial Performance v. Russell*, 691 So. 2d 929, 944-45 (Miss. 1997) (trial by jury and the beyond a reasonable doubt standard of proof do not apply to judicial or attorney disciplinary proceedings); *In re Chastain*, 532 S.E.2d 264 (S.C. 2000) (finding that the double jeopardy clause of the Fifth Amendment is not implicated in attorney disciplinary proceedings); *Gerzof v. Gulotta*, 386 N.Y.S. 2d 790 (N.Y. Sup. Ct. 1976) (there was no due process violation in attorney disciplinary proceedings by reason of fact that appellate division of judiciary effectively acted as the grand jury, prosecutor, judge and jury). Such conclusions are entirely consistent with the decisions of this Court in *Ruffalo* and *Spevack*.

B. Adverse Inferences May Be Drawn In Disciplinary Hearings Where Fifth Amendment Silence Does Not, By Itself, Result In An Automatic Sanction

Moreover, this Court has previously recognized that adverse inferences may be drawn in similar-type disciplinary hearings where Fifth Amendment silence does not, by itself, result in an automatic sanction. In

Baxter v. Palmigiano, 425 U.S. 308 (1976), the Court reviewed whether adverse inferences could be drawn from an inmate's silence in state prison disciplinary proceedings. As a result of the proceedings, the inmate was placed in "punitive segregation" for 30 days at the prison and his classification was downgraded. 425 U.S. at 313. The Court noted that prison disciplinary proceedings are not criminal proceedings. *Id.* at 316. The Court also observed that there were no criminal proceedings pending against the inmate and the state had not sought to make evidentiary use of the inmate's silence at the disciplinary proceeding in any criminal proceeding. *Id.* at 317. The Court found that the inmate's election to remain silent during the disciplinary proceeding did not automatically result in his being found guilty of the infraction with which he had been charged. *Id.* Rather, the inmate remained silent during the proceedings in the face of evidence that incriminated him, and the record revealed that the silence was given no more evidentiary value than the facts surrounding the case. *Id.* at 318.

The Court stated that "[t]his does not smack of an invalid attempt by the State to compel testimony without granting immunity or to penalize the exercise of the privilege." *Id.* The Court further stated:

> In criminal cases, where the stakes are higher and the State's sole interest is to convict . . . the judge and prosecutor [are prohibited] from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt. Disciplinary proceedings in state prisons, however, involve the

> correctional process and important state interests other than conviction for crime. We decline to extend the [prohibition against adverse inferences] rule to this context.
>
> * * *
>
> The short of it is that permitting an adverse inference to be drawn from an inmate's silence at his disciplinary proceedings is not, on its face, an invalid practice.

425 U.S. 318-20.

The case at bar is similar to the one reviewed by the Court in *Baxter*. As the prisoner disciplinary proceedings considered in that case, attorney disciplinary proceedings involve important state interests other than conviction of a crime. Such proceedings are distinguishable from criminal trials where the State's sole interest is to convict. Also, similar to the circumstances in *Baxter*, there were no criminal proceedings pending against the Petitioner at the time of his disciplinary proceedings, and the Bar never sought to make evidentiary use of the Petitioner's silence at the disciplinary proceeding in any criminal proceeding. Moreover, like the inmate in *Baxter*, the Petitioner remained silent in the proceedings in the face of evidence that incriminated him. In fact, here, there was "ample affirmative evidence" against the Petitioner that the Referee found to be "overwhelming." While the Referee stated separately that in addition to all of the evidence she found the Petitioner's silence "compelling," the Referee's report reveals that the Petitioner's silence

was not given any evidentiary value greater than the facts surrounding the case. Hence, the rationale expressed in *Baxter* may be appropriately applied here. *See United States v. Stein*, 233 F.3d 6, 14-17 (1st Cir. 2000) (where the invocation of the Fifth Amendment in attorney disciplinary proceedings did not result in automatic sanctions, the court relied on *Baxter* to find that the state bar disciplinary board could draw adverse inferences from the attorney's Fifth Amendment silence in proceedings before the board), *cert. denied*, 532 U.S. 943 (2001); *McGuire v. Department of Treasury*, 915 F.2d 1583 (Fed. Cir. 1990) (adverse inference from Fifth Amendment silence was appropriate under *Baxter* in Merit Systems Protection Board proceeding to remove individual from the United States Secret Service for allegations of drug use).

II. ANY FIFTH AMENDMENT VIOLATION IS HARMLESS ERROR GIVEN THE CIRCUMSTANCES OF THIS CASE

The erroneous admission of evidence in violation of the Fifth Amendment's guarantee against self-incrimination is subject to harmless-error analysis. *Mayle v. Felix*, 545 U.S. 644, 673 n.6 (2005); *Neder v. United States*, 527 U.S. 1, 18 (1999). To this end, courts have generally found that where, absent the unconstitutional error, evidence remains not only sufficient to support a verdict, but so overwhelming as to establish guilt of the accused, an error is harmless. *E.g., Perkins v. Herbert*, 596 F.3d 161, 175 (2d Cir. 2010), *cert. denied*, __ S. Ct. __ (Oct. 4, 2010); *Prevatte v. French*, 547 F.3d 1300, 1304-05 (11th Cir. 2008), *cert. denied*, 130 S. Ct. 62 (2009); *United States v. Tab*, 259

Fed. Appx. 684, 697 (6th Cir. 2007), *cert. denied*, 552 U.S. 1305 (2008); *United States v. Thornton*, 36 F.3d 1104 (9th Cir. 1994), *cert. denied*, 513 U.S. 1197 (1995); *Richardson v. Lucas*, 741 F.2d 753, 755 (5th Cir. 1984).

Here, the Referee's report denotes that the Bar met its burden of proof and presented overwhelming evidence to support the disbarment of the Petitioner. The Referee stated that the testimony of witnesses to a telephone conversation between the Petitioner and the representatives of a lending company showed that the Petitioner held himself out as a attorney. (App. 8a-10a; App.14a). Additionally, the Referee found that "[t]here was overwhelming evidence that [the Petitioner] directed large sums of money into and out of" his employer's trust account. (App. 12a). The Referee further stated that "[t]here was ample affirmative evidence to support this conclusion." (App. 14a). The Referee's statements that she also drew additional negative inferences from the Petitioner's silence were separate and apart and in addition to her finding that the evidence against the Petitioner was "ample" and "overwhelming." (App. 12a; App.14a).

Thus, even absent the adverse inferences drawn by the Referee, the evidence remained overwhelming so as to establish the guilt of the Petitioner on the issues tried in his disciplinary proceedings. Therefore, pursuant to the precedent of this Court, any error based upon the adverse inferences drawn by the Referee is harmless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — REPORT OF REFEREE IN SUPREME COURT OF FLORIDA CASE NO. SC06-1881

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,	Supreme Court Case No. SC06-1881
Complainant,	
v.	The Florida Bar File No. 2006-71,187 (11M-OSC)
GEORGE LOUIS GARCIA,	
Respondent.	

_____/

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS: Pursuant to the undersigned being duly appointed as Referee for the Supreme Court of Florida to conduct disciplinary proceedings as provided for by Rule 3-5.2(g) of the Rules Regulating The Florida Bar, a final hearing of this cause was undertaken. All of the pleadings, notices, motions, orders, and exhibits are forwarded with this report and the foregoing constitute the record in this case.

The following attorneys appeared as counsel for the parties:

On behalf of The Florida Bar:

William Mulligan
The Florida Bar
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Miami, Florida 33131

Appendix A

On behalf of the Respondent:

Michael Zelman
28 W. Flagler Street
Suite 1021
Miami, Florida 33036

II. PROCEDURAL HISTORY:

1. Pursuant to Supreme Court order, dated May 25, 2000, case number 94,963, Respondent received a three year suspension effective, nunc pro tunc, to August 8, 1998. The Respondent has never been reinstated to practice before the Bar.

2. On or about September 26, 2006, The Florida Bar filed its Petition for Contempt and Order to Show Cause alleging that Respondent violated the May 25, 2000 suspension order.

3. The Petition for Contempt and Order to Show Cause contained very sweeping allegations of misconduct. However, the essence of the petition contained three types or categories of alleged violations:

a.) The first category of alleged violations related to the Respondent engaging in the unlicensed practice of law in connection with his work as a real estate paralegal.

b.) The second category of alleged violations related to the Respondent affirmatively representing himself to the public as a practicing lawyer.

c.) The third and most serious allegations concerned the Respondent's fraudulent use of his employer's trust account for personal gain.

4. At an appropriate point in the pre-trial phase of this litigation, Respondent's counsel filed a motion seeking a more particularized statement from the Bar as to the allegations of fraud and the matter was set for hearing. However, prior to the start of this hearing, Bar counsel advised the Court, as he had previously advised counsel for Respondent, that the allegations of fraud were the subject of a new, separate disciplinary complaint which at that time was winding its way through the normal process of disciplinary investigation by the Bar. (That matter is now pending before the undersigned in Supreme Court case number SC 07-2363; The Florida Bar File number 2008-70,228 (11M).) It was clearly understood that *none* of the allegations of fraud would remain as part of this case. In fact the undersigned assumed, for purpose of this case, that *all* of the approximately 90 real estate closings the Respondent conducted were appropriately handled without complaint from any lender, seller or purchaser.

5. Although it was not formally announced, it was clear that the Bar did not pursue allegations relating to Respondent engaging in the practice of law during the period of his suspension. At least tacitly, the Bar acknowledged that it is permissible for a non-lawyer, including a suspended lawyer (an important distinction in this case) to perform most of the tasks that are normally associated with real estate closings, including

preparation of HUD-1 forms and dealing directly with the lenders to obtain information about a property. In fact, the Bar specifically approved exactly this type of employment by the Respondent on several occasions. (Respondent's Composite Exhibit E) Therefore, despite both the severity and the scope of the initial allegations, this case was tried, and ultimately decided, on two relatively narrow points.

III. ISSUES PRESENTED:

Did the Respondent violate the Supreme Court order of May 25, 2000 by affirmatively holding himself out to the public as a practicing attorney?

Did the Respondent violate the Supreme Court order of May 25, 2000 by receiving, disbursing, or otherwise handling trust funds in violation of Rule 3-6.1(e)?

IV. FINDINGS OF FACT:

1. Since 1998 the Respondent has worked for numerous attorneys as a real estate paralegal with the Bar's knowledge and consent. In January of 2005 the Respondent was employed by Mr. Gabriel Martin ("Martin") in this capacity. Martin testified that when he met the Respondent he was in the process of running for election as a candidate for Public Defender in Miami-Dade County and trying to establish a private practice. (Martin was previously employed as an Assistant Public Defender by the incumbent Public Defender.) Initially, the meetings between the Respondent and Martin were informal and exploratory as Martin was focusing his

efforts on trying to win the election. However, once Martin was defeated, he and the Respondent met again and ultimately agreed to enter into what, at least on paper, was an employment relationship.

2. Martin had very little experience in private practice. His area of specialization was criminal defense and he knew nothing about real estate law. Unfortunately, he also knew next to nothing about trust accounting requirements. Martin testified that once he left the Public Defender's office and before he associated with the Respondent, he opened a law office operating account and a trust account at a local bank and apparently with the help of the bank officer he correctly opened an IOTA trust account. Martin came to think of these two accounts as his "non-real estate" accounts. Once he "hired" the Respondent he decided to open separate operating and trust accounts that he referred to as the "real estate" accounts. Martin testified that these two "real estate" accounts were opened at Ocean Bank, not at his original bank, at the suggestion of the Respondent. This was because of the Respondent's longstanding relationship with Ocean Bank. Martin testified that the Respondent accompanied him to the bank, made introductions to the bank officer and was present while the documents for the two accounts were prepared.

3. Although Martin was technically the Respondent's employer, it was very clear that the Respondent was the economic engine behind Martin's real estate practice. The Respondent advised Martin

to take courses so he could become authorized to write title insurance and earn a fee as the issuing agent. In fact the evidence showed that with the exception of writing the title policy, a job that can only be done by an attorney, every other task, on every closing was actually done by the Respondent. The Respondent brought in the business, he prepared all the documents and he conducted the closings. In over 90 residential closings, Martin was only physically present at one closing. Martin testified that it was initially his intention to learn how to develop and manage a real estate practice with the Respondent's help. However, in reality Martin concentrated on criminal defense and other practice areas and the Respondent handled the real estate side of the practice in at least a semi-autonomous manner. This arrangement would probably have been acceptable assuming Martin exercised appropriate supervision *and* that the Respondent did not affirmatively represent himself to be a practicing attorney *and* that the Respondent never received, disbursed, or otherwise handled trust funds.

4. On occasion other attorneys or their employees corresponded with the Respondent about pending closings. In some instances the Respondent was addressed as "Esquire" or "Esq." by the attorney or his or her staff. However there was no evidence that the Respondent had done anything to encourage anyone to think he was a practicing attorney. In fact, the Respondent's correspondence to lawyers and their employees did not include any reference by him to his status as either a paralegal or attorney. Rather, the

Respondent simply used his name without any designation. The Bar's allegation that he held "himself out as a practicing attorney in this context is NOT SUSTAINED.

5. The Bar also contended that the Respondent held himself out as an attorney in good standing to representatives of Ocean Bank. The Bar produced no actual witnesses on this point and instead relied on certain bank documents to support its contention. (Florida Bar Exhibit 4) The evidence showed that in 2006 the Respondent opened a new account at Ocean Bank in the name of "Geobunny Investments, Inc." This was an account the Respondent apparently intended to use for his personal real estate investments. One of the documents completed by bank employee Olympia Guzman was entitled "Know Your Customer." This form is what is commonly known as a due diligence or anti-money laundering form and is used by many financial institutions. The form was completed by Ms. Guzman and in the form she indicated that the Respondent was an "attorney at law." She also added the following language at the bottom of the form:

> "Mr. Garcia is an attorney specialized in Real Estate closings. He does work for Gabriel Martin, P.A. Also our customer. Mr. and Mrs. Garcia also have their personal account with us." [Sic.]

The Bar's position was that it should be assumed that the Respondent gave this information to Ms. Guzman

in 2006 and that is why she included it the "Know Your Customer Form." Although the Respondent never testified in this matter, his counsel presented evidence that the Respondent had a longstanding relationship with Ocean Bank and with Ms. Guzman dating back to the early 1990's. During that time he was a practicing attorney in good standing in the state of Florida. It is possible, even likely, that Ms. Guzman made assumptions about the Respondents status with The Florida Bar based on this prior relationship. In the absence of any evidence that the Respondent ever saw this form or that he actually told Ms. Guzman any of this information at or near the time the form was generated in 2006 these allegations are also NOT SUSTAINED.

6. The third and only proven example of the Respondent representing himself as an attorney concerned his telephone conversation with representatives of a company called Transcontinental Lending. Apparently at least one of the mortgages processed at Martin's office by the Respondent was eventually sold to investors by Transcontinental Lending. After the investors had an opportunity to look over the various loan documents associated with the mortgage, they exercised their right to have Transcontinental "buy back" the loan. Transcontinental bought the loan back from the investors and eventually a Transcontinental representative contacted the Respondent. The purpose of this call was to correct whatever deficiencies the investors saw in the loan documents so that the loan could be successfully re-sold to another investor. During this initial contact, the

Appendix A

Respondent advised the Transcontinental representative that the loan in question was in the process of being refinanced and paid. Clearly, this was completely satisfactory to Transcontinental and their representative testified that he placed his loan file in pending status in anticipation of the forthcoming closing. In the interim, an investigator from the Bar became aware of serious allegations concerning these closings and made contact with representatives of Transcontinental. Eventually, the two Transcontinental owners, the employee who first contacted the Respondent, and the Bar investigator all went into a conference room and made an unscheduled call to the Respondent. The call was ostensibly to follow-up on the closing for the problem loan. In reality, the investigator was interested in gathering information that could be useful in the Bar's ongoing investigation. Each of the witnesses had a slightly different version of exactly what was said and how the meeting unfolded. For example, one witness recalled that he heard the entire conversation on a speaker phone. Another testified that Transcontinental's representative was speaking on a regular phone and one believed that the conversation started on the speaker phone and then the phone was picked up and taken off speaker. The undersigned found the testimony of the investigator for the Bar to be the most accurate and credible and finds that during this conversation the Respondent was asked by Transcontinental's representative, "You're their attorney, aren't you?" and the Respondent answered "Yes." The allegation that the Respondent held himself out as an attorney on this one occasion is SUSTAINED.

7. The heart of the Bar's case was clearly *not* this one conversation with Transcontinental. The real issue was whether the Respondent, while still under a suspension order, "received, disbursed, or otherwise handled trust funds" in violation of Rule 3-6.1. In answering that question in the affirmative the following factors were of particular importance:

- A non-attorney is able to receive, disburse and otherwise handle trust funds. In fact, it is a common practice for non-attorney closing agents to engage in these functions at real estate closings. However, this Respondent is not a "non-attorney" his status is that of a "suspended attorney."

- As a suspended attorney, pursuant to Rule 3-6.1, the Respondent was under an absolute obligation not to receive, disburse, or otherwise handle trust funds or property. This Respondent was fully aware of this prohibition and had repeatedly acknowledged his compliance with this prohibition under oath in writing. (Florida Bar Exhibit 2)

- The Respondent exercised his right to remain silent and declined to answer any questions or offer any explanations in this matter. Although he is entitled to exercise this right, the inferences that can and should be drawn from his silence are compelling.

8. Martin believed he opened an operating account and a trust account at Ocean Bank on the same day. In

fact he opened the accounts on different days and as far as Ocean Bank was concerned both were "non personal" checking accounts, not trust accounts. The first of those accounts was opened on 2-25-05 and ends in the numbers "205." The account title on the opening paperwork for this account is "Gabriel Martin, P.A." The second account was opened on 4-4-05, is also titled in the name of "Gabriel Martin, P.A." and it ends in the numbers "305." (Respondent's Composite Exhibit C) Martin believed that the "305" account was his real estate operating account and he had checks printed with the name of his law firm and the designation "Operating Account" on the face of each of the "305" checks. Martin also believed that the "205" account was his real estate trust account and he also had checks printed with his firm name and the designation "Trust Account" on the face of each of the "205" checks. Martin testified that he would occasionally pre-sign "305/0perating Account" checks in blank for the Respondent to fill in at closings. Martin also testified that he never pre-signed his "205/ Trust Account" checks. Although the "205/ TrustAccount" was never in compliance with the IOTA or other record keeping requirements of the Bar, Martin treated it as his real estate trust account. He distinguished it from his "305/Operating Account" by allowing the Respondent to fill in blank checks on one account but not the other. He and the Respondent also commonly referred to the accounts as the "Operating" and "Trust" accounts, and obviously the face of each of the checks contained the designation. The "205/Trust Account" was clearly used as a real estate trust account by both Martin and the Respondent in over 90 real estate closings.

9. There was overwhelming evidence that the Respondent directed large sums of money into and out of the "205/Trust Account." Some of that money went into the "305/Operating Account" and then back into the "205/TrustAccount." Furthermore, both "305/ Operating" and "205/Trust Account" funds went into and out of the Respondent's Geobunny Investments, Inc. account that was also maintained at Ocean Bank. (Florida Bar Exhibit 9) Respondent received, handled, and directed trust account funds independently of any effective control by Martin.

10. Respondent actually knew, and at a minimum should have known, that as a suspended attorney, as opposed to a non-lawyer, he had an affirmative obligation to have nothing to do with *any* trust account funds. Although the Respondent chose not to testify there were two arguments advanced on his behalf by his very able counsel. The first was essentially that Rule 3-6.1 should be read and applied narrowly. It was asserted that because the "205/Trust Account" was not actually a properly opened IOTA account, and because Rule 3-6.1 only applies to IOTA trust accounts, the Respondent could not be guilty of violating the Rule 3-6.1. The argument advanced on behalf of the Respondent was that since the "205/Trust Account" was really some type of escrow or settlement account, one that could have been administered by a non-lawyer, it was not a trust account as contemplated by Rule 3-6.1. While I accept the factual premise of counsel's argument, a non-lawyer could have received, directed and controlled these funds, I cannot agree that it is

appropriate to narrowly read Rule 3-6.1. The explicit language of the Rule suggests that the prohibitions imposed on suspended lawyers should be given an expansive reading. Nothing limits the Rule 3-6.1 prohibitions to IOTA accounts or even to attorney's accounts. Not only must the suspended attorney not receive or disburse any trust funds, included within the plain language of the Rule is the additional requirement not to "otherwise handle trust funds or property." As a suspended attorney the Respondent was subject to at least the plain language, if not the spirit, of Rule 3-6.1. He should have avoided all contact with any type of trust funds and he repeatedly and willfully failed to do so.

11. The second argument advanced by counsel for the Respondent was a procedural/due process argument. Counsel contended that because a Rule 3-6.1 violation was not specifically mentioned in the Petition for Contempt, the Respondent could not be found in contempt for violating this specific provision. Simply stated, the Respondent's contention was that the Bar should not be permitted to plead one thing (fraud) and prove another (violation of Rule 3-6.1). However true this may be as a general proposition, it is not applicable in this case. The Respondent was originally accused of using the "205/Trust Account" to engage in a "vast conspiracy that defrauded a host of lenders and other entities by conducting countless fraudulent real estate transactions." The allegations in the Petition for Contempt always specified that the Respondent's use of the "205/Trust Account" during his employment with Martin was at issue. In a pre-trial stipulation, all

allegations of fraud were eliminated from consideration in this case and it was understood that the Referee would presume that there was no fraud of any kind in these transactions. However, the issue that remained was always understood to be whether given his status as a suspended lawyer, the Respondent's improperly used the "205/Trust Account." There was ample affirmative evidence to support this conclusion. In addition, because Respondent chose not to testify and explain the transactions or contradict the testimony of Martin, the additional negative inferences are compelling. The Bar met its burden of proving the Respondent violated the order of suspension in two respects. The Respondent held himself out as an attorney in his telephone conversation with the Transcontinental representatives. However, under the totality of circumstances this was a de minims violation and standing alone it would not have supported a recommendation that the Respondent be found in contempt. However, the Respondent's flagrant and willful violations of Rule 3-6.1 in connection with the Martin "205/Trust Account" are extremely serious and support a recommendation of a finding of contempt of the Supreme Court order of May 25, 2000.

V. RECOMMENDATION AS TO GUILT:

I recommend that Respondent be found in contempt of the Supreme Court order dated May 25, 2000, in case number 94,963.

Appendix A

VI. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED:

Based on the foregoing findings of fact, I hereby find that PERMANENT DISBARMENT is the appropriate sanction in this case. In making this recommendation the Referee heard and considered the Respondent's mitigation evidence.

VII. STATEMENT OF COSTS AND RECOMMENDATION AS TO THE MANNER IN WHICH COSTS SHOULD BE TAXED:

The Referee reserves on the taxation of costs in this matter. For reasons previously alluded to in prior requests for extensions, this matter was tried in the last days of the time period permitted by the court. The first draft of this Report did include the Bar's itemized statement of costs but that document was not provided to Respondent's counsel until late in the day on February 27, 2008. Counsel for the Respondent has filed his objections to the Bar's request and the Bar would like the opportunity to reply. Both counsel have conferred and have agreed that the Report of the Referee should be finalized with this issue reserved. A Supplemental Report will be filed within ten (10) days.

Appendix A

VIII. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD:

Age: 53

Date Admitted to Bar: July 2, 1993

Prior disciplinary record:

1. In The Florida Bar File No. 1999-70,037 (11P), Supreme Court Case No. SC93-913, Respondent was suspended pursuant to court order dated January 4, 1999, as a result of his entering a plea of no contest to two felony counts. (Adjudication was withheld as to both counts.)

2. In The Florida Bar File No. 1999-70,869 (11M), Supreme Court Case No. SC94-963, Respondent received a rehabilitative suspension pursuant to court order dated May 25, 2000, due to the above referenced felony pleas.

DATED this 29 day of Feb., 2008.

/s/ Deborah White-Labora

HON. DEBORAH WHITE-LABORA,
Referee

Copies furnished to:
Michael Zelman, Attorney for the Respondent
Kenneth L. Marvin, Staff Counsel
William Mulligan, Bar Counsel

APPENDIX B — ORDERS OF THE SUPREME COURT OF FLORIDA IN CASE NO. SC06-1881

Supreme Court of Florida
FRIDAY, JANUARY 8, 2010

CASE NO.: SC06-1881
Lower Tribunal No(s).: 2006-71,187(11M-OSC)

THE FLORIDA BAR vs. GEORGE LOUIS GARCIA

Complainant(s) Respondent(s)

The report of the referee, and supplement thereto, is approved. Respondent is held in contempt of this Court and permanently disbarred, effective immediately.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from George Louis Garcia in the amount of $7,554.34, for which sum let execution issue.

Not final until time expires to file motion for rehearing, and if filed, determined. *The filing of a motion for rehearing shall not alter the effective date of this permanent disbarment.*

QUINCE, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, LABARGA, and PERRY, JJ., concur.

A True Copy
Test:
/s/ Thomas D. Hall [SEAL]

Thomas D. Hall
Clerk, Supreme Court

cic

Appendix B

Served:

HON. DEBORAH WHITE-LABORA, JUDGE
KENNETH LAWRENCE MARVIN
WILLIAM MULLIGAN
GEORGE LOUIS GARCIA

Appendix B

Supreme Court of Florida

WEDNESDAY, MARCH 3, 2010

CASE NO.: SC06-1881
Lower Tribunal No(s).: 2006-71,187(11M-OSC)

THE FLORIDA BAR vs. GEORGE LOUIS GARCIA

Complainant(s) Respondent(s)

Respondent's "Motion for Rehearing and Certification" is hereby denied. *See* Fla. R. App. P. 9.330.

QUINCE, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, LABARGA, and PERRY, JJ., concur.

A True Copy
Test:
/s/ Thomas D. Hall [SEAL]

Thomas D. Hall
Clerk, Supreme Court

bhp

Served:
HON. DEBORAH WHITE-LABORA, JUDGE
KENNETH LAWRENCE MARVIN
WILLIAM MULLIGAN
GEORGE LOUIS GARCIA

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(3)

No. 09-1490

Supreme Court, U.S.
FILED
OCT 18 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

GEORGE LOUIS GARCIA,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

On Petition For A Writ Of Certiorari To The Florida Supreme Court

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State courts are in conflict as to whether this court has abandoned *In re Ruffalo*

Some states follow *In re Ruffalo*, 390 U.S. 544 (1968) and hold that lawyer disciplinary hearings are quasi-criminal, forbidding any adverse inference from Fifth Amendment silence.[1]

Other states hold that lawyer disciplinary hearings are civil, disregarding this court's precedent in *In re Ruffalo*, permitting an adverse inference from Fifth Amendment silence.[2]

Respondent makes no mention of this dramatic conflict among the high courts of many states.

Respondent relies on *Baxter v. Palmigiano*, 425 U.S. 308 (1976) and asserts lawyer disciplinary hearings "are similar type disciplinary hearings

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[1] *In re Silverberg*, 327 A.2d 106 (Pa. 1974); *Attorney Grievance Comm'n v. Unnamed Attorney*, 467 A.2d 517 (Md. 1972); *State ex rel. Oklahoma Bar Ass'n v. Wilcox*, 942 P.2d 205 (Okla. 1997); *In re Regan*, 885 So.2d 514 (La. 2004); *In re March*, 376 N.E.2d 213 (Ill.1978); *State Bar of Michigan v. Block*, 158 N.W.2d 49 (Mich. Ct. App. 1968); *Akinaka v. Disciplinary Bd. of Hawai'i*, 979 P.2d 1077 (Haw. 1999). *See also*, *Fischer v. Hooper*, 732 A.2d 396 (N.H. 1999) (forbidding adverse inferences from Fifth Amendment silence in all evidentiary proceedings).

[2] *State v. Postorino*, 193 N.W.2d 1 (Wis. 1972); *State v. Horton*, 561 A.2d 488 (Me. 1989); *Matter of Meier*, 344 S.E.2d 212 (Ga. 1986); *In re Snyder*, 71 A.D.3d 140 (N.Y. App. Div. 1 2010).

where Fifth Amendment silence does not, by itself, result in automatic sanction." Brief in Opposition ("Opp.") 9.

Baxter is distinguishable since this court specifically found that parole hearings are civil proceedings and not quasi-criminal. It must also be remembered that convicted felons are not accorded the same rights and status as attorneys who are officers of the court charged with protecting the Constitutional rights of fellow citizens.[3]

When does an adverse inference from Fifth Amendment silence become impermissible coercion in governmental civil disciplinary hearings

Ignoring the quasi-criminal nature of lawyer discipline and focusing on civil proceedings, the complicated question is when does government involvement in a disciplinary proceeding rise to the level of coercion such that constitutional protections inure?

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[3] Lawyers are confronted with ethical issues more frequently than other professions, thus "Hotlines" are provided by some Bar associations. *E.g.*, <http://www.floridabar.org/> Lawyers and Fifth Amendment silence is akin to the necessity of immunizations for health care workers due to the proximity to disease.

Essentially every enforcement action involving a license or government related employment falls into this grey area. The Securities and Exchange Commission in enforcement actions and the Department of Justice in corporate criminal investigations specifically seek litigation advantages by coercing individuals to waive Fifth Amendment rights. Brief of Pet. 11, n. 13. *See also*, Susan E. Brune, *White Collar Crime Policy*, *in Champion*, 34-APR CHAMP 43 (National Association of Criminal Defense Lawyers, Inc., 2010) ("the Division of Enforcement staff is to be substituted into the role of the U.S. Attorney's Office, negotiating cooperation, non-prosecution and deferred prosecution agreements").

The issue in the case before the court wherein the burden of proof was "clear and convincing"[4] evidence and the referee found a "compelling" adverse inference from the invocation of Fifth Amendment silence, in addition to "ample affirmative evidence" of guilt (Appendix ("App.") 11, 14), resides in this confusing grey area bounded by two lines of cases.

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[4] This has been the burden of proof for lawyer disciplinary hearings in Florida for decades. *The Florida Bar v. Schonbrun*, 257 So.2d 6 (Fla. 1971), *see also The Florida Bar v. Shankman*, 41 So.3d 166 (Fla. 2010).

The first line of cases forbids an adverse inference from Fifth Amendment silence when the punishment is automatic or the only evidence for guilt is the invocation of the Fifth Amendment.[5] One state even forbids adverse inferences from Fifth Amendment silence in all proceedings. *Fischer v. Hooper*, 732 A.2d 396 (N.H. 1999).

The second line follows *Baxter*, finding that adverse inferences are permissible in civil proceedings.

The two cases following *Baxter* and cited by Respondent as support for the Report of Referee in the case before the court are inapplicable, but these cases do illustrate that the dividing line

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[5] *Spevack v. Klein*, 385 U.S. 511 (1967) (Fifth Amendment silence alone prohibits disbarment); *Slochower v. Board of Education*, 350 U.S. 551 (1956) (a teacher may not be dismissed solely for exercising Fifth Amendment silence); *Garrity v. New Jersey*, 385 U.S. 493 (1967) (a police officer compelled by threat of termination to waive Fifth Amendment rights was determined to be impermissible); *Gardner v. Broderick*, 392 U.S. 273 (1968) (a police officer may not be terminated for refusing to waive Fifth Amendment rights); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (state law unconstitutional for proscribing a five year ban from holding party or political office if Fifth Amendment rights had been asserted).

between permissible inference and impermissible coercion, is unsettled. Opp. 12.[6]

This area of law needs clarification by this court.

Reply to specific issues raised in Brief in Opposition

Respondent mischaracterizes the issues raised by Petitioner, who never asserted "constitutional rights, are to be applied with full force in lawyer disciplinary hearings as in a criminal trial." Opp. 3, 4, 5.

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[6] Respondent cites *McGuire v. Department of Treasury*, 915 F.2d 1583 (Fed. Cir. 1990), an unreported opinion, as an example of a permissible adverse inference from Fifth Amendment silence. McGuire gave testimony on two prior occasions denying that he had abused drugs and then invoked his Fifth Amendment right at hearing. Thus the adverse inference went more to the credibility of McGuire's prior denials, as opposed to a quantum of guilt as in the case before the court.

Respondent also cites *United States v. Stein*, 233 F.3d 6 (1st Cir. 2000) for the proposition that an adverse inference from Fifth Amendment silence is permissible in lawyer disciplinary hearings. *Stein* is dicta and involves appellate application of the clear error standard of appellate review to findings in a Motion to Suppress in a criminal case wherein the defendant lawyer failed to object to the admission of a years prior deposition given to a state bar association. The Motion to Suppress argued that the deposition was coercive because an adverse inference might have been inferred if the lawyer had not testified.

The rationale of *Stein* and the unreported decision in *McGuire* do point to the need for this court to clarify the dividing line between a permissible adverse inference from Fifth Amendment silence and impermissible coercion.

Respondent mischaracterizes the Report of Referee in describing the quantum of evidence of guilt found by the Referee. The Referee never made a finding that the evidence of guilt was "overwhelming" as Respondent attempts to imply in its brief. Opp. 6. Instead the Referee found there was "ample affirmative evidence to support this conclusion. In addition, because the Respondent chose not to testify and explain the transactions or contradict the testimony of Martin, the additional negative inferences are compelling." (App. 14, *See*, 11) Thus ample evidence (not overwhelming evidence) alone did not suffice to prove guilt by clear and convincing evidence. The adverse inference was a significant portion of the proof needed to disbar Petitioner. This is also evident by the fact that the violation for which Petitioner was disbarred was relatively minor. Petitioner was found guilty of contact with a trust account while suspended, though the same level of contact is permissible for the law office bookkeeper.

There can be no argument that the adverse inference from Petitioner's exercise of his Fifth Amendment right to silence was harmless error, as Respondent asserts in their brief. Opp. 12. A harmless error determination would require a review of the complete record that comprises several full days of testimony and numerous exhibits, not a review of a Recommendation of Referee. This is especially true given the two references to the "compelling" adverse inferences from Fifth Amendment

silence cited by the Referee (App. 11, 14) and the onerous clear and convincing burden of proof required for disciplinary action.

CONCLUSION

This court should grant the Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,

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